Supreme Court, U.S.
FILED

No. 98-1103 DEC 31 1998

OFFICE OF THE CLERK

In The
Supreme Court of The United States
October Term 1998

GENE HAZZARD,

Petitioner,

v.

JOSEPH D. HOWARD, et al.

Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

GENE HAZZARD
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Pro se

APPELLATE ADVANTAGE
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65 pp

QUESTIONS FOR REVIEW

1. Whether a court of review violated its function by failing to consider the legality of petitioners written filed jury instructions as records on appeal.

2. Whenever any motion that a court of law improperly makes, limiting the admission of evidence that supports a litigants affirmative defense, has that litigants due process and equal protection protection rights been violated?

3. Whenever a court of law gives out improper written jury instructions which prevents jurors from considering litigants legitimate affirmative defense, does it violate a litigants due process and equal protection rights to which the litigant is entitled?

4. Are judges remarks which would cause a confrontational response from jurors, prejudicial?

LIST OF PARTIES

GENE HAZZARD, Petitioner
JOSEPH D. HOWARD
Appellee
U.S. DISTRICT COURT OF APPEAL
Respondent

TABLE OF CONTENTS

PAGE

QUESTIONS FOR REVIEW i
LIST OF ALL PARTIES ii
TABLE OF CONTENTS iii
OPINIONS BELOW vi
JURISDICTION vi
TABLE OF AUTHORITIES v
STATUTES, RULES, CASE LAW v
STATEMENT OF THE CASE 1
REASONS WHY THE WRIT
SHOULD BE GRANTED 3
ARGUMENT 17
CONCLUSION 21
CERTIFICATE OF SERVICE

APPENDICES

APPENDIX A
OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT ..... Apdx A -1

APPENDIX B
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA ..... Apdx B -3

APPENDIX C
MUNICIPAL COURT OF CALIFORNIA
COUNTY OF ALAMEDA
OAKLAND-PIEDMONT-EMERYVILLE
JUDICIAL DISTRICT . . . . . Apdx C-17

TABLE OF AUTHORITIES

CASES **PAGE**

U.S. v. PALAZZOLO
(1995) 71 F. 3d 1233, 1237-38 11

GIZONI v. SOUTHWEST MARINES INC.
(1995) 56 F. 3d 1138, 1142 11

LANDON v. LOOS
E.D. MICH (1988) 694 F. SUPP. 253 7

SHAW v. CASSAR
D.C. MICH (1983) 558 F.SUPP. 303 7

WILLIAMS v. MATTHEWS CO.
(C.A. ARK. 1974) 499 F. 2d 819
certioria denied 419 U.S. 1021 7

SULLIVAN v. LITTLE HUNTING PARK INC.
(1069) 396 U.S. 229 ..... 7, 9

AGEE v. LOFTON
C.A. IOWA (1961) 287 F. 2d 709 ..... 16, 18

STATUTES

42 U.S.C. 1982 ..... *passim*

FEDERAL CIVIL PROCEDURE 2173(1). 2174 ... 11

RULES

FEDERAL JURY PRACTICE section 8.05 19

BOOK OF APPROVED JURY
INSTRUCTIONS (BAJI) section 15.35 19

OPINIONS BELOW

1. The United States District Court, special verdict in the matter No. C-96-01084FMS, entry of judgment filed June 30, 1997(see appendix B)

2. Ninth Circuit affirms jury verdict judgment entry June 12, 1998 (see appendix A)

3. Petitioner's petition for rehearing denied, Ninth Circuit C-97-16178 entry of judgment October 6, 1998 (see appendix A)

JURISDICTION

Petitioner, Gene Hazzard has filed in a timely manner C-97-16178 for review. Pursuant to 28 U.S.C. 1253, 1254. This court has the reviewing authority of petitioners Writ of Certiorari. The central issue for review is the failure of the courts to properly apply the law under 42 U.S.C. 1982

STATEMENT OF THE CASE

- This case originated in the Municipal Court of California, County of Alameda, Oakland/Piedmont/Emeryville Judicial District, Case No. 566654 wherein appellee Joseph D. Howard brought an unlawful detainer action against petitioner, Gene Hazzard.

- Pro Temp Judge, Carlos C. Laruche granted appellee's motion for order in limine (see appendix C), preventing petitioner from introducing parol and or extrinsic evidence, or any issues of discrimination under 42 U.S.C. 1982 as a defense. (see appendix C).

- During the spring of 1995, petitioner began the practice of setting up tables outside his antique store on the public sidewalk and providing chess games where largely African American males both adults and youth played peacefully while others gathered around and watched.

- The court entered its summary judgment ruling on October 19, 1995 finding that, "the term of the lease between the parties was for 13 months commencing August 1, 1994 and ending August 31, 1995. Judgment was also entered in favor of appellee's unpaid rent for

the month of September and October which appellee refused when offered by petitioner prior to trial. (see appendix A)

- **Petitioner filed an action on March 25, 1996 in the United States District Court based on 42 U.S.C. 1982 seeking to have his claim heard, that he was not allowed to remain in the commercial leased premises because of the African American males playing chess in front of petitioners antique store.**

- Following a two day trial commencing on June 9, 1997 the jury returned a special verdict, indicating that race was not a factor when appellee, Howard refused to extend petitioner, Hazzard's lease beyond one year. (see Appendix B)

- Petitioner, Hazzard filed an appeal on November 28, 1997 Ninth Circuit Court (see Appendix B)

- Petitioner's appeal denied by Ninth Circuit (see appendix B)

- Petitioner's request for rehearing denied, judgment was entered on October 6, 1998 (see appendix B)

REASONS WHY THE WRIT SHOULD BE GRANTED

A. The function of the Respondent, United States District Court and the Court of Appeal, is to review errors of law. The method by which this is done is the application of the principles of law in a uniform manner.

B. It is the power of the Supreme Court as stated in SMITH v. TIME PUBLISHING CO [178 P.S. 481, 36 A. 2981 "to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not to manifestly against justice-a power exercise in pursuance of a sound judicial discretion, without which the jury system would be capricious and intolerable tyranny which no people could long endure."

C. RESPONDENTS, by failing to apply the law 42 U.S.C. 1982, disregarded their function as a court of review. In disregarding stare decision principles, thereby violating Petitioner's due process and equal protection.

RESPONDENTS IMPROPER JUROR INSTRUCTIONS LEAD TO AN IMPROPER APPLICATION OF THE LAW [42 U.S.C. 1982]

1. In municipal court a motion in limine was approved, forbidding any testimony about discrimination as an

affirmative defense,

"Plaintiff Joseph D. Howard will move the court for orders preventing all parties herein from introducing, alluding to, eliciting or arguing about any evidence which concerns, reflects to (3) any evidence of discrimination against defendants violation of the Constitution or laws of the United States or California.

B. Defendants Should Not Be Permitted to Present Evidence Regarding Discrimination Plaintiff in Violation of the Laws of of the United States or California.

Defendants have set up as an affirmative defense that plaintiff in some manner has arbitrarily discriminated against defendants in seeking to have them remove themselves from the premises at the end of the lease term. In support of the affirmative defense they have sought to utilize factors that are not relevant at all to the lease (e.g., claiming that plaintiff seeks to evict defendants to terminate the free assembly of African-Americans outside the premises being leased to defendants). Defendants have no lease to the premises; it expired on August 31, 1995. They have no right

to continue to remain in the premises and any that does not relate directly to the lease and obligations and rights thereunder is not relevant to this action. **Therefore, all evidence regarding any arbitrary discrimination should be precluded.** Various individuals have sought to have plaintiff explain why he will not renew the lease. There is no obligation on plaintiff's part to give any such explanation.

Defendants have failed to pay rent for September and October and are obviously thereby conceding that the rent term was for the period that expired on August 31, 1995. (see document lodged with the Clerk of the Court)

2. **The U.S. District Court accepted the motion in limine of the lower court.**

U.S. DISTRICT COURT USED WRONG APPLICATION OF 42 U.S.C. 1982 IN ITS JUROR INSTRUCTIONS.

3. Special Jury Instruction No. 4(page 11)states,
It is the plaintiff's burden under section 1982 to establish a prima facie case of discrimination. He may do this by showing that by virtue of his race

he was deprived by the defendant of his right to enter a transaction regarding property. The plaintiff may show this by focusing on a particular transaction and showing the following four things: (1) that he is a member of a racial minority; (2)that plaintiff applied for and was qualified to rent certain property; (3) that plaintiff was rejected; and (4) that the rental opportunity remained available thereafter. If the plaintiff establishes the four elements of prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for his conduct. If defendant does not rebut, the plaintiff's prima facie case, then the plaintiff prevails.

If the defendant successfully rebuts the prima facie case, then the plaintiff has an opportunity to establish that the defendant's explanation was merely a pretext for discrimination. (see appendix, exhibit B)

PETITIONERS BASIS FOR DISCRIMINATION

Petitioner/Plaintiff never alleged that Appellee/Defendant discriminated against him but rather defendants action not to continue plaintiff's lease (as contained in paragraph 3(b)(i) of

the lease agreement) was based on plaintiff's African American male guests who were playing chess in front of his store. None of the special instructions given to the jury acknowledged this fact; nor were the jurors given any guidance as to the application of 42 U.S.C. 1982 in this circumstance. Failing to properly instruct the jurors resulted in less weight given to the evidence presented by the plaintiff. (see Plaintiff informal brief pp. 11)

42 U.S.C. 1982 PROHIBITS CONSIDERATION OF RACE AS A FACTOR IN DENYING A LEASE

There are ample authorities supporting Petitioners claim, LANDON v. LOOS 694 F. Supp. 253, "for the position that a landlord cannot threaten to evict a tenant because that tenant has black guest; SHAW v. CASSAR D.C. MICH. (1983), 558 F. Supp. 303, "for the position that racial animus need not be the solo reason for evicting a tenant to give rise to an action is stated if one reason for eviction was racially motivated; WILLIAMS v. MATTHEWS CO. (C.A. ARK. 1974) 449 F. 2D 819 CERTIORIA DENIED 419 U.S. 1021, "race is an impermissible factor in a real estate transaction and cannot be brushed aside because it was neither the sole reason nor total factor for discrimination; SULLIVAN v. LITTLE HUNTING PARK INC. (1969) 396 U.S. 229, "that a narrow construction of the language of 42 U.S.C. 1982 would be inconsistent with the broad and sweeping nature of

protection meant to be afforded by the statute."

Respondents special juror instructions did not include Petitioners defense that the 'race' of those who were playing chess was a legitimate defense under 42 U.S.C. 1982.

JURORS RAISED 'RACE' AS A POSSIBLE 42 U.S.C. 1982 DEFENSE, BUT JUROR INSTRUCTIONS PRECLUDED THEM FROM CONSIDERING THAT DEFENSE. (see Appendix B)

The jury requested the following information from the court during their deliberations:

> **"The jury has a question of law-- if the Plaintiff's race was not factor in his eviction from the property, does the racial makeup of the chess players have any role in the jury's deliberation?"** (see Appendix B)

The special written instructions included consideration of Petitioners race only on the issue of applying and qualifying as an applicant. There were no references to race as a factor in the termination of a lease, thus, the jurors could not consider race of the African American males playing chess in front of Petitioners store as a factor in terminating the lease.

Petitioner, contends that 42 U.S.C. 1982 applies and protects him from being discriminated against by a commercial landlord to the extent that the commercial landlord must renew or extend his lease. Appellees refusal to continue to lease to Petitioner as prescribed by 42 U.S.C. 1982 SULLIVAN v. LITTLE HUNTING PARK INC., supra.

WHY THE UNITED STATES SUPREME COURT REVIEW IS BEING SOUGHT

1. **AS A PRINCIPLE OF LAW WHEN RESPONDENT'S JUROR INSTRUCTIONS EXCLUDES RELEVANT EVIDENCE FROM TRIAL, PETITIONERS DUE PROCESS AND EQUAL PROTECTION RIGHTS HAVE BEEN VIOLATED.**

5.01 Burden of Proof-Preponderance of the Evidence

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the claim or affirmative defense is more probably true than not true. You should base your decision on all of the evidence, regardless of which party presented (see appendix, exhibit B, pp.7)

5.01 of the juror instructions is applied only to the narrow interpretation of 42 U.S.C. 1982 (special instruction #4), thereby excluding any evidence pertaining to a wider interpretation of 42 U.S.C. 1982 which includes 'race' as a partial factor in the termination of a lease, etc.

When the Court applies a principle of law in an improper manner such that a legitimate evidence supporting an affirmative defense is denied, that litigants due process and equal protection rights have been violated. **GIZONI v. SOUTHWEST MARINES INC. (1995) 56 F. ed 1138, 1142, "a party is entitled to instructions regarding his or her theory of the case, if it is supported by law and has some foundation of evidence." [Federal civil procedure - 2173(1)], U.S. v. PALAZZOLO(1995) 71 F. 3d 1233, 1237-1238, [I]f the misleading instructions did prejudice the complaining party then the proper remedy is a new trial."**

2. EVIDENCE SUPPORTS THAT 'RACE' WAS A FACTOR

In addition to the testimony and the claims of the Petitioner, that 'race' was a factor in the termination of his lease, this claim was also supported by the limited testimony of Appellee, Howard and his witness Janene Silverman, owner of ZZa's a nearby restaurant to whom Appellee also leases. Ms. Silverman had expressed her objections to the proliferation' of the chess games, because the players were African American males. As noted in Ms. Silverman's cross-examination [RT page 10 line 20-25, and page 11 line 1-6, Q-Plaintiff's attorney, A - Ms. Silverman's response[

Q. From August 1994, August 1, 1995, until September 1995, was there any other activity that was going on that you found objectionable?

A. They--well, I guess there--well, the expansion of the chess games were (sic) kind of creeping down the street, which was, you know, taking over, I guess, you'd say

Q. Who was playing chess?

A. I think there were different races, but, it was the majority black.

Appellee Howard's testimony [Q-Plaintiff's attorney, A-defendant Howard's response]. In responding to questions during cross-examination by Plaintiff's attorney, defendant compares the 'white' crowd of individuals who were eating at tables outside or waiting for tables while drinking wine at ZZa's "EUROPEAN" and a "docile" scene; while in contrast defendant Howard refers to the group of African American males playing chess in front of Plaintiff's as that of a "mob" [RT page 26 line 6-9, page 29 line 1-15]

Q. I think you testified earlier there was a "European" flavor to it.

A. Well, not only European, you go around now and you find a lot of that being done in the United States.

Q. The image that you had of the group sitting outside of Mr. Hazzard's store was the image of a mob; is that correct?

A. I would say that, yes.

Q. The image that you had of the crowds, the groups congregating outside of Zza's restaurant was of a docile crowd; is that correct ?

A. Yes.

Q. Can you articulate for the jury, for me, why the image in front of Mr. Hazzard's store was that of a mob?

A. Well, I'm going to ask the jury to visualize the scene about 20, 30 congregated in one area and not being quiet, and the other one sitting down eating in a very gentle way that is rather common and not unusual in other areas of the city.

Defendant, Howard continues to demonstrate through his testimony that 'race' was indeed a factor in his decision to terminate, Plaintiff's lease prematurely, [RT pages 30 line 11-20, Q-Plaintiff's attorney, A - Defendant's response]

Q. But the primary factor was the image that the activities in front of his store was lending to the property, is that --isn't that correct?

A. I mentioned to you that everything contributed to it, not just one-not just the chess players.

Q. But that was one of the contributing factors; isn't that correct?

A. Of the--of the chess players? I would have preferred to

have it gone, but I never made an issue of it. I never did.

Although, Appellees testimony was very compelling supporting Petitioners claim, evidence regarding 'race' as a factor in the termination of the lease was not allowed as admissible evidence.
Improper juror instructions did not allow the jurors to consider 'race' of the chess players as a legitimate affirmative defense under 42 U.S.C. 1982.

3. **COURT OF APPEALS FAILED IN IT'S FUNCTION BY FAILING TO REVIEW THE WRITTEN JUROR'S INSTRUCTIONS OF THE COURT, THEREBY DENYING PETITIONER A FAIR TRIAL.**

Procedural due process rules are shaped by the risk inherent in the truth-finding process as applied to the generality of the case.

The courts failure to proper instruct the jurors as to the application of the statute 42 U.S.C. 1982 relating to Petitioners specific claim, seriously impaired Petitioners ability to receive a fair and just trial. **BOYD, (1989) 494 U.S. at 380.**

UNIFORMITY AND CONSISTENCY IN THE APPLICATION OF THE LAW, THIS IS WHY THE SUPREME COURT REVIEW IS NEEDED.

4. **JUDICIAL REMARKS THAT ARE PREJUDICIAL VIOLATES A LITIGANTS DUE PROCESS AND EQUAL PROTECTION RIGHTS.**

During cross-examination of Appellee by Petitioners attorney; and after over-ruling an objection by Appellee's attorney; the Court preceded to interrupt Petitioner's attorney prior to his cross-examination of Appellee with the following remarks

> **"I WOULD SIMPLY SAY ON BEHALF OF THE JURY AND THE COURT THIS WHOLE THING IS BECOMING VERY REPETITIVE, ANY OF THE JURORS DISAGREE, RAISE THEIR HANDS."**
> [Reporters Transcript page 28 line 22]

These untimely and obtrusive remarks on behalf of the Court created a hostile environment for Petitioner's case.

The Court failed to substantiate the nature of the "repetitiveness" to which she refers. It should not be forgotten Petitioners attorney had not begun his cross-

examination, subsequent to the Court over-ruling an objection by Appellee's attorney. In fact, the Court admonished Appellee's attorney, by indicating Petitioner's attorney was well with his rights, inasmuch Appellee's attorney open the door for his line of questioning.

The Court erred in not following appropriate courtroom procedure in calling for a 'side-bar' rather than to voice the Court's unsubstantiated opinion in front of jurors.

In conducting a further "poll" of the jurors when they were asked, **"any of the jurors disagree, raise their hands"**, was a comment by the Court that had untold repercussions to the Petitioners case.

If there were any jurors who disagreed with the Court they would have been loathe to raise their hand for fear of reprisal. The Court exceeded any reasonable conduct and abused the power of its discretion.

The courts opined in AGEE v. LOFTON C.A. IOWA'S (1961), 287 F. 2d 709, **that when a timely objection is not made at trial appellate review is not precluded, since "counsel would have been loathe to challenge the propriety of a trial judge's utterances for fear of antagonizing him and thereby prejudicing a client's case... No useful purpose can be served by listing the**

objectionable remarks complained by the plaintiff. They were, we think clearly improper, unjustified and prejudicial.

ARGUMENT

A. THE COURT OF APPEALS VIOLATED PETITIONERS CONSTITUTIONAL RIGHTS BY DISREGARDING UNCONTROVERTED FACTS AND PRINCIPLES OF LAW, THEREBY DENYING PETITIONER A FAIR TRIAL.

Submitted for review in the Court below were relevant portions of the reporters transcript of the testimony of Appellee, Howard and Janene Silverman, witness for Appellee, both testimonies clearly establish that 'race' was an impermissible factor in Appellee's decision to prematurely terminate Petitioner's lease [see Appellant Petition for rehearing pp. 3 line 16-28, pp. 4 line 1-6], **A VIOLATION OF 42 U.S.C. 1982**

B. THE COURT OF APPEALS FAILED TO REVIEW THE ENTIRE STATEMENT OF THE PREJUDICIAL REMARKS BY THE TRIAL JUDGE FERN SMITH, PETITIONER CLAIMS INFLUENCED THE JURY VERDICT

Submitted for review from the reporters transcript on page 3 line 1-7 of Appellants Petition for Rehearing are the prejudicial remarks by Judge Fern Smith. **supra**

These comments by Judge Smith were made during Petitioner's attorney cross-examination of Appellee , Howard. There was no substantive basis for her remarks; having over-ruled an objection by Appellees attorney during cross-examination, in fact admonishing Appellee's attorney, for it was he who revisited an area which allowed Petitioner's attorney to precede in a line of questioning that was perhaps going to establish foundation. However, Petitioner's attorney was unable to continue with any line of questioning because of the intrusion of the Courts remarks.

The Courts remarks reflected a fixed opinion and a drawn conclusion prior to any cross-examination of Appellee, Howard. The Court below failed to consider and comment on the more substantive portion of Judge Smiths remarks, **"any of the jurors disagree raise their hands"**.

Conducting what is considered to be a "poll" during cross-examination of a witness, goes contrary to any principles of courtroom procedure. **AGEE v. LOFTON** supra.

C. **THE FAILURE OF THE COURT OF**

APPEAL TO MAKE A DETERMINATION ON THE ASSIGNMENT OF ERROR AS TO THE JURY INSTRUCTION WHEN OFFICIAL RECORDS OF THE COURT WAS SUBMITTED FOR REVIEW, VIOLATES PETITIONERS CONSTITUTIONAL DUE PROCESS AND EQUAL PROTECTION RIGHTS.

The Court of Appeal opined, "that Petitioner failed to designate as necessary to his claim those portions of the trial transcript relevant to his assignment of error as to the jury instructions, we cannot determine, and thus do not consider those issue. **FRAP 10(1-A) states, order from the reporter a transcript of such parts of the proceedings not already on file as is considered necessary".**

Submitted for review to the Court below in Petitioners Petition for Rehearing were the official filed jury instructions of the Court. Petitioner has complied with the Federal rule of the items filed in the Court. It was not necessary for review, that Petitioner had to submit a reporters transcript of the relevant portions of the jury instruction as requested in the Courts opinion below. Both **Book of Approved Jury Instructions(BAJI)** section **15.35**, and the **Federal Jury Practice** section **8.05**, the preferred medium of jury instructions are those which are written. When the Court has

filed in the Clerks office of the Court **jury instructions** these become an **official** document and therefore sufficient for review.

THE IMPROPER JURY INSTRUCTIONS BOTH IN THE APPLICATION RELATED TO PETITIONERS SPECIFIC CLAIM UNDER 42 U.S.C. 1982 AND THE SUPPRESSION OF EVIDENCE ARE THE CRITICAL ISSUES AND ARE THE CRUX TO PETITIONER ABILITY TO RECEIVE A FAIR TRIAL.

CONCLUSION

The courts below have departed from the general accepted practices of judicial standards.

The legal principles and theory for which the Fourteenth Amendment is based, entitles all litigants to due process and equal protection.

The law was not followed by the courts below, constituting a reversible err and remand for trial

Date, December 31, 1998

Respectfully submitted,

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Pro Se

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-16178
CT/AG#: CV-96-01084-FMS

GENE HAZZARD
Plaintiff -- Appellant

v.

JOSEPH D. HOWARD; MUNICIPAL COURT OF CALIFORNIA IN ALAMEDA COUNTY, OAKLAND-EMERYVILLE-PIEDMONT JUDICIAL DISTRICT; ALAMEDA COUNTY SHERIFF'S DEPARTMENT
Defendants -- Appellees

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered June 12, 1998

UNITED STATES COURT OFAPPEALS
FOR THE NINTH CIRCUIT

FILED
/s/ OCT - 6 1998
CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

GENE HAZZARD,	)	No. 97-16178
Plaintiff-Appellant	)	D. C. No.
v.	)	CV-96-01084-FMS
JOSEPH D. HOWARD,	)	
MUNICIPAL COURT OF	)	ORDER
CALIFORNIA IN	)	
ALAMEDA COUNTY,	)	
OAKLAND-EMERYVILLE-	)	
PIEDMONT JUDICIAL	)	
DISTRICT; ALAMEDA	)	
COUNTY SHERRIFF'S	)	
DEPARTMENT,	)	
Defendants-Appellees.)		

Before: REINHARDT, THOMPSON and LEAVY, Circuit Judges.

The petition for rehearing is denied.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT
OF CALIFORNIA

Filed
/s/ Jun 11 1997
Richard W. Wieking
Clerk U. S. District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GENE HAZZARD,
Plaintiff

v.

JOSEPH D. HOWARD, MUNICIPAL COURT OF CALIFORNIA, OAKLAND-PIEDMONT-EMERYVILLE JUDICIAL DISTRICT, ALAMEDA COUNTY SHERIFF and DOES 1 TO 20
Defendants

No. C-9601084 FMS

JURY INSTRUCTIONS

DATED: /s/ June 10, 1997 /s/ Frank Smith
UNITED STATES

DISTRICT JUDGE

3.01 Duties of Jury to Find Facts and Follow Law

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return that is a matter entirely up to you.

3.02 Use of Notes

You may use notes taken during trial to assist your memory. Notes, however, should not be substituted for your memory, and you should not be overly influenced by the notes.

3.03 What is Evidence

The evidence from which you are to decide what the facts are consists of:

1. the sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness;
2. the exhibits which have been received into evidence; and
3. any facts to which all the lawyers have agreed or stipulated.

3.05 What is Not Evidence

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the

facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

3.06 Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

3.07 Credibility of Witnesses

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to:
2. the witness' memory;
3. the witness' manner while testifying;
4. the witness' interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness' testimony;
6. the reasonableness of the witness' testimony in light of all the evidence; and
7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

5.01 Burden of Proof--preponderance of the Evidence

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true. You should base your decision on all of the evidence, regardless of which party presented it.

Special Instruction No. 1:

The Statute

The plaintiff brings this claim under 42 U.S.C. § 1982, which reads: All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Special Instruction No. 2:

Purpose of the Statute

Section 1982 is designed to prohibit any attempt to deprive a person because of his race of his right to buy, sell, hold, lease, or inherit property of all kinds.

Special Instruction No. 3:

Plaintiff's Race Not Dispositive

The fact that a plaintiff is black does not in itself give rise to an inference that the defendant's conduct is racially motivated or discriminatory.

Special Instruction No.. 4:

General Instruction

It is the plaintiff's burden under section 1982 to establish a prima facie case of discrimination. He may do this by showing that by virtue of his race he was deprived by the defendant of his right to enter a transaction regarding property. The plaintiff may show this by focusing on a

particular transaction and showing the following four things:

1. that he is a member of a racial minority;
2. that plaintiff applied for and was qualified to rent certain property;
3. that plaintiff was rejected; and
4. that the rental opportunity remained available thereafter.

If the plaintiff establishes the four elements of this prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for his conduct. If the defendant does not rebut the plaintiff's prima facie case, then the plaintiff prevails. If the defendant successfully rebuts the prima facie case, then the plaintiff is given an opportunity to establish that the defendant's explanation was merely a pretext for discrimination.

I will now give you a brief explanation of each of these four elements.

Special Instruction No. 5:

The Plaintiff Must Be a Member of a Racial Minority

Special Instruction No. 6:

Plaintiff Must Have Applied for and Have Been Qualified to Rent the Property

The plaintiff must prove that he was financially capable of renting the property when he entered into the lease.

Special Instruction No. 7:

Plaintiff s Offer Must Have Been Rejected

The plaintiff must prove that his application to rent the property was rejected or denied. The plaintiff may prove this element by showing that, even though he did not make a formal offer that was denied, the defendant so discouraged him from making an offer on the property that it was clear that making an offer would have been a futile gesture.

Special Instruction No. 8:

That the Rental Opportunity Remained Available

The plaintiff must prove that the property was available for leasing or renting at the time of the rejection of plaintiff's application.

Special Instruction No. 9:

Consideration of Defenses

If after taking into account the plaintiff's evidence and the defendant's rebuttal of that evidence you find that the plaintiff has established as an initial matter each and every element of his claim, then and only then should you concern yourselves with the defenses offered by the defendant.

Special Instruction No. 10:

Burden of Persuasion on Defenses

As you consider the defendant's defense, remember that, with regard to that defense, the burden of persuasion

remains with the plaintiff that is, the plaintiff must disprove the defense by a preponderance of the evidence. Simply put, the defendant establishes the defense unless you find that the evidence which opposes the existence of that defense has more convincing force to you than the evidence which supports it.

If you find that the plaintiff has successfully rebutted the defense that is, if you find that race was indeed a factor, even a small factor, in the defendant's rejection of the plaintiff's offer then you must find for the plaintiff. If you find that the defendant has established his defense that is, if you find that the entire reason(s) the defendant refused the plaintiff's offer was (were) a factor (factors) other than race- then you must find for the defendant.

Special Instruction No. 16:

In deciding the facts of this case, you must accept that the lease between plaintiff and defendant was for a period of 13 months, commencing on August 1, 1994, and ending August 31, 1995, and that decision was made by the Municipal Court of the County of Alameda.

7.01 Damages-Proof

If you find for the plaintiff on plaintiff's racial discrimination claim, you must determine plaintiff's damages. Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount

of money which will reasonably and fairly compensate the plaintiff for any injury you find was legally caused by the acts of the defendant. You should consider the following:

The reasonable value of earnings lost to the present time.

You may not include any amounts for the purpose of punishing the defendant or setting an example. You may not include damages that are speculative, only possible, or that are based on guesswork.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED
/s/ June 11 1997
Richard W. Wieking
Clerk, U. S. District Court
Northern District of California

NOTE FROM THE JURY

Case Number: */s/ C-96-1084FMS*
Case Name: */s/ Hazzard vs. Howard*

THE JURY REQUEST THE FOLLOWING:

Date: */s/ 6/10*
Time: */s/ 3:30*

/s/ The jury has a question of law: If the Plaintiff's Race was not a factor in his eviction from the property, does the racial makeup of the chess players have any role in the jury's deliberations?

/s/Jury instructed verbally 3:55 p.m. 6/10/97

THE JURY HAS REACHED A

UNANIMOUS VERDICT: _____

Date:_____

Time:_____

/s/ Allen J. Romceu

Jury Foreperson

FILED
/s/ June 11, 1997
RICHARD W. WIEKING
CLERK, U. S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GENE HAZZARD,

Plaintiff,

No. C 96-1084 FMS
SPECIAL VERDICT

vs.

JOSEPH D. HOWARD,

Defendant.

Number 1: Was race a factor in Joseph Howard's refusal to extend Gene Hazzard's lease beyond one year?

YES _____ NO */s/*____

If you answer "No," sign and return this verdict. If you answer "Yes," answer questions numbers 2 and 3.

Number 2: What is the total amount of damages, in terms of monetary loss, sustained by Gene Hazzard?

$ _____

Number 3: What is the total amount of damages, sustained by Gene Hazzard for emotional distress, humiliation, and embarrassment?

$ _____

Dated: */s/ 6/11/97*

/s/ Allen J. Romano
Jury Foreperson

APPENDIX C

MUNICIPAL COURT OF CALIFORNIA
COUNTY OF ALAMEDA
OAKLAND-PIEDMONT-EMERYVILLE
JUDICIAL DISTRICT

H. WAYNE GOODROE,
state Bar No. 064137
LARSON & BURNHAM
A Professional Corporation
P.O. Box 119 Oakland,
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Facsimile: (510) 835-6666

Attorneys for Plaintiff
JOSEPH D. HOWARD

Filed 10/18/95
Municipal Court
Oakland-Piedmont-Emeryville
Judicial District
by /s/ Deputy Clerk

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF ALAMEDA
OAKLAND-PIEDMONT-EMERYVILLE
JUDICIAL DISTRICT

JOSEPH D. HOWARD,
Plaintiff,

v.

HAZZARD, et al.,
Defendants.

No. 566654

NOTICE OF MOTION AND MOTION FOR ORDERS IN LIMINE; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Time: 9:00 a.m.
Dept.: 18

TO ALL PARTIES HEREIN AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 9:00 a.m. on October 16, 1995, or as soon thereafter as the matter may be heard in the trial, department to which this action is assigned, prior to commencement of trial, plaintiff Joseph D. Howard will move the court for orders preventing all parties herein from introducing, alluding to, eliciting or arguing about any evidence which concerns, reflects or relates to:

1. Any extrinsic evidence relating to the lease agreement entered into between plaintiff Joseph D. Howard and defendants Gene Hazzard and Noory Nooruddin on or about August 1, 1994, which lease was for a specific term of 13 months as set forth in paragraph 2.1 of the lease.

2. Any interpretation of the lease agreement by other than the court as interpretation of a contract is a matter of law.

3. Any evidence of discrimination against defendants violation of the Constitution or laws of the United States or California.

This motion in limine will be made on the grounds that such evidence and/or argument is not relevant to the subject matter of this action and the value of such evidence or argument is substantially outweighed by its danger of unfair prejudice.

The court is further requested to direct defendants' counsel to caution, warn and instruct defendants and defendants' witnesses not to make any reference to such evidence and to follow the same order.

This motion is based on this notice of motion, the supporting memorandum of points and authorities and on all pleadings and records on file in this action.

DATED: October */s/ 13* 1995

LARSON & BURNHAM

By: */s/ H. Wayne Goodroe*

H. Wayne Goodroe

Attorneys for Plaintiff

JOSEPH D. HOWARD

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

This is an unlawful detainer action. Joseph D. Howard and defendants Gene Hazzard and Noory Nooruddin entered into a 13-month lease for the premises at 544 Grand Avenue, Oakland, on or about August 1, 1994. The specific

term of the lease was for a 13-month period as set forth in paragraph 2.1 of the lease, commencing August 1, 1994 and ending August 31, 1995, unless sooner terminated pursuant to the lease. The lease contains no options nor any provisions for any extended periods after the end of the lease term. A copy of the lease is attached hereto as Exhibit 1.

A notice was given to defendants on August 1, 1995, reminding them that the term of the lease expired on August 31, 1995, and that no holdover or month to month tenancy would exist.

At the end of the lease term on August 31, 1995, defendants failed to remove themselves from the premises. Anticipating that defendants would not vacate the premises at the end of the lease term on August 31, 1995, the notice referred to above also served as a 30-day notice of termination of tenancy.

A. Interpretation Of The Contract Is A Matter Of Law For The Court and Extrinsic Evidence Should be Excluded.

It is well settled in California that contract interpretation is a matter of law unless the interpretation turns on the credibility of extrinsic evidence. Parsons v. Bristol Development Co. (1965) 62 Cal.2d 861, 865. This lease is clear and unambiguous, particularly with respect to the term, of the contract. The lease is for a fixed term (i.e., 13 months),

commencing August 1, 1994 and ending August 31, 1995. During the term of the lease, the tenant is entitled to exclusive possession of the premises, however, the tenancy terminates automatically at the expiration of the fixed term without notice to the tenant. Camp v. Matich (1948) 87 Cal.App.2d 660, 665. Defendants attempt to engraft onto the "term" of the lease the language in paragraph 3(b), which anticipated what the rent would be should there be an extension of the lease. No extension was granted, no extension is provided for in the lease, nor is any option to renew provided for in the lease. The lease terminated on August 31, 1995; no other interpretation is possible.

The court should make a ruling at the outset that the lease is fully integrated, is clear and unambiguous in its terms and that the term was for a 13-month period. No extrinsic evidence should be allowed to explain or contradict the lease.

The general rules applicable to the interpretation and enforcement of contracts are applied for the interpretation and enforcement of a lease. Civ. Code §§ 1635-1662, see also, Medico-Dental Building Co. v. Horton & Converse (1942) 21 Cal.2d 411, 418, 419. There is no ambiguity about the term of the lease, and given its reasonable and sole interpretation, it is for a period of 13 months commencing August 1, 1994 and ending August 31, 1995. There are no ambiguities to be explained by way of parol or extrinsic evidence. However, should the court entertain or allow parol evidence, the parol, evidence rule prohibits the introduction of testimony of

collateral oral agreements that contradict or modify the terms of the written lease. American National Insurance Co. v. Continental Parking Corporation (1974) 42 Cal.App.3d 260, 265 266. Further, the lease in section 18.4 provides that its is the entire agreement of the parties and that:

> ... all prior or contemporaneous oral agreements between and among themselves and their agents or representatives relative to the leasing of the Premises are merged in or revoked by this Agreement.

B. Defendants Should Not Be Permitted To Present Evidence Regarding Discrimination Against The Defendants In Violation Of The Constitution of The Laws Of The United States Or California.

Defendants have set up as an affirmative defense that plaintiff in some manner has arbitrarily discriminated against defendants in seeking to have them remove themselves from the premises at the end of the lease term. In support of the affirmative defense they have sought to utilize factors that are not relevant at all to the lease (e.g., claiming that plaintiff seeks to evict defendants to terminate the free assembly of African-Americans outside the premises being leased to defendants). Defendants have no lease to the premises; it expired on August 31, 1995. They have no right to continue

to remain in the premises and any evidence that does not relate directly to the lease and the obligations and rights thereunder is not relevant to this action. Therefore, all evidence regarding any arbitrary discrimination against defendants should be precluded. Various individuals have sought to have plaintiff explain why he will not renew the lease. There is no obligation on plaintiff's part to give any such explanation. Defendants have failed to pay rent for September and October and are obviously thereby conceding that the rent term was for the period that expired on August 31, 1995.

II. CONCLUSION

For the foregoing reasons, plaintiff requests the court to enter an order in limine which has been requested by this moving plaintiff so that the trial of this matter can be handled efficiently and equitably.

DATED: October */s/ 13* 1995

Respectfully submitted,
LARSON & BURNHAM

By: */s/ H. Wayne Goodroe*
H. Wayne Goodroe
Attorneys for Plaintiff
Joseph D. Howard

Oakland-Piedmont-Emeryville
Municipal Court
600 Washington Street
Oakland, CA 94607

Receipt No.: 170131
Clerk: dkincaid
Date 12/16/98

Type	Case Number	Description	Amount
Service	OCV 0566654	6 Photo copy Page(s) GENE	4.50

HAZZ

Total Fees Due	4.50	Total Deposit:	
Total Paid:	4.50	Type:	
Overage:	.00		
Excess Fee:	.00		
Change:	.00		

Payment Method:

Cash:	4.50
Check:	.00
Credit Card:	.00

Partial Judgment
Municipal Court Oakland-Piedmont-Emeryville
Judicial District Dated 10/19/95

Accordingly, and in conformance with the court's ruling or the motion for orders in limine,

IT IS THE FINDING OF THIS COURT that the term of the lease between the parties was for 13 months, commencing August 1, 1994, and ending August 31, 1995, and, therefore, the lease terminated by its own terms on August 31, 1995.

IT IS THE JUDGMENT OF THIS COURT that plaintiff recover possession of the premises located at 544 Grand Avenue in the city of Oakland, county of Alameda, State of California.

The clerk of this court shall issue a writ of possession directing that the sheriff for this county remove defendants and other occupants from the above-described premises.

IT IS THE FURTHER JUDGMENT OF THIS COURT that the lease between plaintiff and defendants, and each of them, is terminated as of August 31, 1995.

IT IS THE FURTHER JUDGMENT OF THIS COURT that plaintiff recover from defendants, and each of them:

(1) Unpaid rent for the months of September and October 1995 in the amount of $1,000 for each month for a total of $2,000; and

(2) Costs of suit.

DATED: /s/ 10/19/95, 1995

/s/ Carlos C. Laroche
CARLOS C. LAROCHE
Judge of the Municipal Court

/s/ This judgment was entered on 10/19/1995 and placed in the court. Beltran Clerk Administrator
by M. Takeda
Deputy Clerk